Confidentiality in Discrimination-Related Dispute Mediation: Is There a Congressional Mandate for Union Employees to Have an Individual Right to Pursue Mediation Without Union Representation?

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I. INTRODUCTION

The increasing number of employment-related discrimination suits[1] and the costs involved to fight those suits have prompted employers, the judiciary, and Congress to seek alternatives to formal litigation.[2] Employers especially have sought alternatives since litigating a simple discrimination

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[1] *See* David C. Belt, *Election of Remedies in Employment Discrimination Law: Doorway into the Legal Hall of Mirrors*, 46 CASE W. RES. L. REV. 145, 145 (1995) (noting that since the enactment of Title VII, the number of discrimination claims has experienced a dramatic increase); Michael Schachner, *Suits Send Employers Running For Cover: New Statutes, Same Old Attitudes Create Liability Woes*, BUS. INS., Nov. 21, 1994, at 57, 57 (noting that during the past 20 years, federal cases have risen 125% while employment cases are up 2166%); R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1535 (1994) (stating that the major expansion of statutory rights and remedies has fueled and will continue to fuel the trend to take workplace disputes to court); Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 HOFSTRA LAB. L.J. 247, 248 (1993) (noting that more than 18 million lawsuits are filed each year and that a growing number of them are employment discrimination suits).

[2] *See* Belt, *supra* note 1, at 146 (mentioning congressional endorsement of alternatives to litigation in the Civil Rights Act of 1991); Silberman et al., *supra* note 1, at 1536 (noting judicial support for alternatives to litigation). At the federal level, there has been a major move toward alternatives to litigation, including adoption and implementation of the following measures: (1) the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–482 (1994), which requires federal courts to develop plans for speedy and inexpensive resolutions to civil disputes; (2) the Negotiated Rule Making Act of 1990, 5 U.S.C. §§ 561–570 (1994 & Supp. II), which encourages facilitated negotiations in the regulatory setting; (3) the Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571–584 (1994 & Supp. IV 1998), which encourages federal agencies to use alternatives to litigation; and (4) an executive order issued by former President George Bush, Exec. Order No. 12,778, 3 C.F.R. 359 (1992), which endorses the use of alternatives to litigation when resolving claims for or against the United States or its agencies. *See* Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 82 (1996).

suit can cost them between $50,000 and $80,000[3] and take years to get from complaint to trial.[4] Beyond these costs, the employers have to deal with workplace disruption, poor employee morale, and damaged reputation to the company.[5] Employers therefore seek an alternative that not only decreases the monetary costs and the time spent resolving discrimination complaints but that also increases workplace harmony.[6]

One alternative to formal litigation to which employers have turned is alternative dispute resolution (ADR).[7] ADR methods[8] are faster, less

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[3] *See* Jeffrey P. Ferrier, *ADA and ADR: Approaching an Adequate Adjudicatory Allocation*, 45 CATH. U. L. REV. 1281, 1281 (1996) (citing Stephen W. Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age and ADA Claims*, 37 ST. LOUIS U. L.J. 985, 992 (1993)).

[4] *See id.* at 1281–82 (noting that "it can take years and thousands of dollars to get an employment discrimination case from the complaint stage through discovery and finally to trial"); *see also* Robert J. Lewton, Comment, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 993 (1996) (explaining that "employers have painfully discovered the tremendous time and expense involved in litigating [employment discrimination] claims").

[5] *See* Lewton, *supra* note 4, at 993.

[6] Representatives of the United States Postal Service (USPS) state that they want more than just monetary benefits from their mediation program; they want workplace harmony. *See* Lisa Bingham & Cindy Hallberlin, *Postal Service Expanding Workplace Dispute Program*, CONSENSUS, Oct. 1998, at 1, 1. Referring to the USPS's mediation program, a Postmaster General stated, "[w]e are looking for more than settlement rates. The Postal Services strives to manage conflict more effectively, so that employees can satisfactorily deal with their disputes and return their focus and energy to work." *Id.* Bingham and Hallberlin report that in pilot programs, there was a 55%–75% settlement rate in the mediations and an improvement in overall workplace relationships. *See id.* For additional information on the USPS's mediation program, see *infra* Part IV.C.

[7] *See* Ferrier, *supra* note 3, at 1281, 1306 (noting that as court dockets become more crowded and employees file more discrimination suits, ADR increasingly becomes a viable alternative to litigation); Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOL. L. REV. 327, 328 (1998) ("A party can save eighty percent of court and counsel costs through the mediation process, and the court system benefits through a reduction in its workload."); Silberman et al., *supra* note 1, at 1536 (noting that employers increasingly are turning to internal ADR methods in part because of a growing trend to extend to employees a greater opportunity to participate in management); Lewton, *supra* note 4, at 993.

[8] ADR methods include arbitration (third party makes a binding judgment), mediation (neutral mediator facilitates discussion), negotiation (parties negotiate without a third party or neutral), and various hybrid processes such as private judging, neutral expert, minitrial, ombudsman, and summary jury trial. *See* STEPHEN B. GOLDBERG ET AL.,

expensive,[9] and less disruptive to workplace relationships[10] than formal litigation. They also can, if implemented as an internal procedure, strengthen the employer's position with the Equal Employment Opportunity Commission (EEOC), the courts, and their employees.[11] One ADR method in particular, interest-based mediation, can help resolve disputes before employers have to resort to the more costly and time-consuming ADR processes,[12] like arbitration.[13] Although the other ADR processes are less costly and time consuming than litigation, successful mediation can stop the

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DISPUTE RESOLUTION 4–5 (2d ed. 1992).

[9] *See* Stipanowich, *supra* note 2, at 85 (noting that mediation's popularity arose in part because it is speedier and less expensive than more elaborate ADR techniques). Stipanowich notes that in his survey of public contracts attorneys, mediation was viewed as the superior method for reducing dispute resolution time and expense. *See id.* at 148.

[10] *See* Ferrier, *supra* note 3, at 1302 (noting that ADR tends to be less confrontational than litigation and that the parties often exit the process feeling victorious). Ferrier states that ADR offers employers an opportunity to work things out with the employee. *See id.* If a settlement can be reached, Ferrier states, both sides have saved time and expense. *See id.* Noting how ADR contributes to a less disruptive workplace, Silberman states:

> ADR contributes to employee morale by enabling managers and employees to develop trust and respect, by allowing employees to take an active role in settling disputes while preserving ongoing relationships, and by giving employees a forum for their complaints before either side become too antagonistic or entrenched in a particular position.

Silberman et al., *supra* note 1, at 1537.

[11] *See* Silberman et al., *supra* note 1, at 1553. Silberman cites two cases, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), for the proposition that having an internal procedure allows an employer, if he must resort to litigation, to strengthen his case before the EEOC and in court. *See* Silberman et al., *supra* note 1, at 1553–54 & n.133. In *Gardner-Denver*, the Supreme Court stated: "Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight." *Gardner-Denver*, 415 U.S. at 60 n.21. In *Meritor*, the Supreme Court noted that the employer's grievance procedure against discrimination was relevant in determining employer liability for sexual harassment. *See Meritor*, 477 U.S. at 71.

[12] Many times, a dispute resolution program will include more than one type of ADR process. Typically, the first process will be a nonbinding procedure like mediation or negotiation. If the first process does not work, the next step will be a more complex and costly ADR procedure like arbitration or a minitrial. *See* GOLDBERG ET AL., *supra* note 8, at 409–10 (suggesting that when creating a dispute systems design, a designer should arrange the procedures in a low-to-high cost sequence (mediation and negotiation are listed as occurring at the low-cost end of the sequence)).

[13] *See* Stipanowich, *supra* note 2, at 80 (noting that in the construction industry, arbitration is preferable to litigation but that the best alternative is mediation).

process early, which saves the employer from spending time and money on more complex ADR processes or litigation.[14] This is especially true in a unionized workforce.

In a unionized workforce, where arbitration is used on a regular basis, some of the characteristics that plague formal litigation—expensive, slow, formal, and combative—have become characteristics of labor arbitration.[15] In these unionized workforces, employers will have to look toward a process like mediation to help save monetary and nonmonetary costs and time.

As for the nonmonetary costs, mediation in a unionized workforce focuses on the individual problem of the parties and thus improves the quality of the outcome[16] and the overall work environment.[17] Labor arbitration, on the other hand, is not focused on the individual problem and thus does not improve the quality of the outcome and work environment like mediation.[18] Rather, "as the grievance moves through the grievance procedure, it is argued about less and less as a workplace problem, and more and more as a matter of contract right."[19] As a result, the parties may end labor arbitration with the same problem they had before arbitration.[20]

For a mediation to work effectively, advocates of mediation argue that there must be confidentiality[21] and a focus on the individual's problem.[22]

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[14] *See supra* note 12 and accompanying text. If mediation is successful, the parties do not have to move to the more costly ADR processes or to litigation.

[15] *See* Stephen B. Goldberg, *The Rise in Grievance Mediation*, *in* PROCEEDINGS OF NEW YORK UNIVERSITY THIRTY-SEVENTH ANNUAL NATIONAL CONFERENCE ON LABOR 13-2, 13-2 (Richard Adelman ed., 1984) [hereinafter Goldberg, *The Rise in Grievance Mediation*]. Describing the labor arbitration process, Goldberg states:

> The labor arbitration process . . . tends to be both slow and expensive. Delays of six to nine months from the request for arbitration to the receipt of the arbitrator's written decision are common, and costs are substantial, with the average arbitrator's bill in excess of $1,300 per case. Adding the cost of the transcript, the briefs, and attorney's fees, each party may spend more than $5,000 to arbitrate a grievance. Complaints about excessive formality are also common.

Id; *see also* Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 Nw. U. L. Rev. 270, 270 (1982); Silberman et al., *supra* note 1, at 1539 (noting that because arbitration is a trial-like process, it "may exacerbate the adversarial aspect of the parties' relationship").

[16] *See* Goldberg, *The Rise in Grievance Mediation*, *supra* note 15, at 13-4.

[17] *See supra* note 10 and accompanying text.

[18] *See* Goldberg, *The Rise in Grievance Mediation*, *supra* note 15, at 13-2.

[19] *Id.*

[20] *See id.*

[21] *See* Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 441 n.3 (1984).

This creates a conflict between the interests of the labor union and the interests of the employee. While the employee will want to be involved in a mediation that focuses on his problem and protects his right to confidentiality, the union will want to be present and will be focused on the collective interest.[23]

The focus of this Note is on the conflicts that arise when the employer of a unionized workforce institutes an informal, interest-based mediation program,[24] outside the union grievance process, to reduce the costs of potential Title VII[25] discrimination law suits. This conflict will arise when a union employee, participating in an informal mediation, does not want union representation.[26] Instead, the employee wants to pursue his own individual rights and keep the mediation confidential from the union. On one hand, advocates of mediation support the waiver of the union's representational rights because confidentiality and focusing on individual interests are essential to mediation. On the other hand, the union has a right under section

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[22] *See* Goldberg, *The Rise in Grievance Mediation*, *supra* note 15, at 13-4 (arguing that a theoretical advantage of mediation it is that is problem-centered, unlike arbitration).

[23] *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 256–57 (1975) (pointing out that at a confrontation, the union safeguards not only the particular employee's interest, but the interests of the entire bargaining unit).

[24] The focus of this Note is on mediation rather than other ADR processes because this Note is dealing with the employment setting, in which the preservation of workplace relationships is important, and mediation has been found to be particularly successful in resolving disputes while preserving relationships. *See* U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN OF THE HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT, SUBCOMMITTEE ON CIVIL SERVICE: ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 17 (1997) (noting that mediation is particularly useful in employment discrimination cases); Silberman et al., *supra* note 1, at 1538 (noting that mediation is well suited to cases in which preservation of an ongoing employment relationship is important); Stipanowich, *supra* note 2, at 150–51 (noting that in response to a survey, attorneys ranked mediation as the most effective method of opening channels of communication and one of the most effective at enhancing job relationships); *see also id.* at 85 (noting that mediation reopens channels of communication and is therefore recommended for disputes, as in employment settings, that involve continuing relationships). Mediation has proven to be so successful that the EEOC will spend $13 million in fiscal year 1999 on its ADR program. *See 'Significant' Expansion of ADR Program in the Works, EEOC Chairwoman Castro Says*, 67 U.S.L.W., No. 22, at 2342 (Dec. 15, 1998).

[25] *See* Civil Rights Act of 1991, 42 U.S.C. §§ 1981 *et seq.* (1994 & Supp. III 1997).

[26] This Note only deals with situations where the unionized employee does not want union representation. If the employee wants union representation, then there is no problem.

9(a) of the National Labor Relations Act (NLRA)[27] to be present at the adjustment[28] of any grievance between the employee and employer[29] and thus may be able to force itself into an otherwise confidential process.[30]

The remainder of this Note explores the current status of representational rights under section 9(a) of the NLRA and presents plausible arguments to limit that right in favor of confidentiality in discrimination-related mediation. Part II briefly explains the mediation

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[27] National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1994). The NLRA covers private sector labor unions. *See id.* § 152.

[28] Adjusting a grievance means settling or handling a grievance.

[29] *See* 29 U.S.C. § 159 (a). Section 9(a) of the NLRA provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.*

Id. (emphasis added).

[30] The Supreme Court of the United States gave union members the right to waive their *Weingarten* right in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (1975). The *Weingarten* right is the right of an employee to have union representation in an investigatory interview (as opposed to a disciplinary meeting where there is a mandatory obligation to meet with the union representative) in which there is a risk of discipline. *See id.* at 257, 260. Section 7 of the NLRA has been interpreted to give the *Weingarten* rights. *See id.* at 260–64; *see also* 29 U.S.C. § 157. If there is no risk of discipline in such an interview, and the union member does not want union representation, then the union, theoretically, does not have to be present. *See Weingarten*, 420 U.S. at 257–58.

An Equal Employment Opportunity (EEO) precomplaint meeting is arguably like an investigatory meeting (certainly not like a disciplinary meeting). However, the National Labor Relations Board (NLRB) has on many occasions held that the union has a section 9(a) right to be present at those meetings. *See, e.g.*, United States Postal Serv. & Am. Postal Workers Union, Columbus Area Local, 281 N.L.R.B. 1015, 1016 (1986). Therefore, at the precomplaint meeting, where interest-based ADR procedures could take place, there will be no confidentiality from the union.

Although there is somewhat of a clash between *Weingarten* rights and the union's section 9(a) rights, section 9(a) rights are explicitly clear that the union must be provided with an opportunity to be present at the adjustment of grievances. *See* 29 U.S.C. § 159(a). Because mediations often end with the settlement of a grievance, the focus of this Note is on the conflict section 9(a) causes between the individual right to confidentiality and the collective right of the bargaining unit.

process and emphasizes those elements that are most essential to the process. Part III sets out relevant National Labor Relations Board (NLRB) decisions and court cases that discuss the union's representational rights and its right to have access to confidential information. Part IV lays out arguments to limit the union's right to be present in informal mediation. Two of the arguments under Part IV revisit the struggle between majoritarian rights and individual rights. The third argument is based on the Administrative Dispute Resolution Act of 1996[31] (ADRA), which directs federal agencies to adopt policies that address "the use of alternative means of dispute resolution and case management."[32] In adopting these ADR processes, federal agencies are directed by the ADRA to keep in confidence ADR communications.[33] Part V lists alternatives to a total ban on union representation in discrimination-related mediations. Part VI concludes that because confidentiality is important to mediation, and because the United States Supreme Court has held that individual employees have a special right to pursue their discrimination complaints outside of the union process, the NLRB must reconsider its interpretation of section 9(a) and limit the union's representational rights in discrimination-related mediation.

II. DEFINING A SUCCESSFUL MEDIATION

Mediation[34] is an interest-based ADR procedure "in which a third party assists the disputants in reaching agreement"[35] and structuring future relations.[36] During mediation, parties "retain the power to shape both the agenda for discussion and the ultimate agreement."[37]

Mediation typically consists of the following overlapping stages: introduction, presentation of viewpoints by each party, expression of emotions, caucus discussion about confidential information and views about settlement, and a possible agreement.[38] Throughout these stages, the

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[31] Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571–584 (1994 & Supp. IV 1998)

[32] 5 U.S.C. § 571 note (Promotion of Alternative Dispute Resolution).

[33] *See* 5 U.S.C. § 574(b).

[34] Mediation has been in existence for nearly 4000 years. *See* Shaw, *supra* note 7, at 329. Mediation initially was used in biblical times to resolve disputes. *See id.*

[35] WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 6 (1993).

[36] *See* Note, *supra* note 21, at 443.

[37] *Id.* at 444.

[38] *See* NANCY H. ROGERS & CRAIG MCEWEN, MEDIATION: LAW, POLICY & PRACTICE § 3:02 (2d ed. 1994).

mediator[39] "assists parties in discussing points of difference and agreement, in clarifying interests, in identifying alternative resolutions, and in accepting compromise, leaving to [the parties] the decision to accept or reject a settlement."[40] Ultimately, mediation, at best, "turn[s] conflict into a constructive process" and, at the least, "gives parties a chance to preserve ongoing relationships or make the termination of a relationship less destructive."[41]

In order for the mediation to function properly, there must be an atmosphere of trust, free of restraint and intimidation.[42] Scholars argue that confidentiality is essential to create such an atmosphere.[43] Confidentiality allows the parties to be frank with each other[44] and to share freely their

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[39] The mediator is not like a judge. Rather, the mediator acts as a "catalyst" for the mediation process. Note, *supra* note 21, at 444. The mediator does not compel production of information and does not submit a judgment "by applying preordained rules to the dispute after hearing reasoned argument." *Id.* William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg expound on what an effective mediator can do:

> A mediator may be able to move the negotiations beyond name calling by encouraging the disputants to vent their emotions and acknowledge the other's perspective. A mediator can help parties move past a deadlock over positions by getting them to identify their underlying interests and develop creative solutions that satisfy those interests. Where each side is reluctant to propose a compromise out of fear of appearing weak, the mediator can make such a proposal. Mediators are thus well placed to shift the focus from rights or power to interests. Mediation can serve as a safety net to keep a dispute from escalating to a rights procedure, such as litigation, or to a power procedure, such as a strike.

William L. Ury et al., *Designing an Effective Dispute Resolution System*, 4 NEGOTIATION J. 413, 420 (1988).

[40] *See* ROGERS & MCEWEN, *supra* note 38, § 3:02.

[41] *See* Note, *supra* note 21, at 444.

[42] *See id.* at 441 & n.2.

[43] *See id.*; *see also* Shaw, *supra* note 7, at 334 (noting that confidentiality is essential for full cooperation); Alan Kirtley, *Best of Both Worlds: Uniform Mediation Privilege Should Draw from Both Absolute and Qualified Approaches*, DISP. RESOL. MAG., Winter 1998, at 5, 5 (noting that confidentiality is a cornerstone of mediation's success which the author states is used as a means to "open up" the mediation discussion).

For a discussion on mediation confidentiality laws, see Note, *supra* note 21, at 459 (concluding that rules protecting confidentiality in mediation will make it "easier and safer for parties . . . [to] settle their dispute outside the courthouse"), and see generally Joshua P. Rosenberg, Note, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157 (1994).

[44] *See* Note, *supra* note 21, at 445 (noting that an "[a]greement may be impossible if the mediator cannot overcome the parties' wariness about confiding in each other during these sessions").

interests and points of view so that the mediator is apprised of the parties' positions and interests and is better able to perform her function.[45] As one author states: "[B]ecause parties in mediation can discuss their dispute on their own terms without confining themselves to issues and facts relevant to a legal cause of action, they may discover the otherwise hidden causes of conflict between them and arrive at a more satisfactory and lasting resolution to the dispute."[46] If the scholars are correct that the parties need to be frank and free to share with one another to reach a more satisfactory result, then there are several reasons why union representation in a mediation in which the employee does not want that representation can make the mediation unsatisfactory.

For example, in an embarrassing situation, such as a graphic quid pro quo sexual harassment dispute,[47] a union representative will be one additional person to whom the employee has to tell her humiliating story.[48] Besides the employee having to share information she does not want the union or anyone else to know, the union's presence may cause restraint and intimidation on the part of management. As a result, management may be less cooperative in the mediation due to the fear that the union representative will know certain details prior to the filing of a formal grievance complaint—a complaint that, as a result of the mediation, may never be filed. Additionally, the parties may never agree to a settlement if they cannot overcome their wariness about confiding in one another during the mediation.[49] Thus, the "otherwise hidden causes of conflict between them"[50] will not arise, and the parties will not be able to "arrive at a more satisfactory and lasting resolution to the dispute."[51]

In addition, if confidentiality is not preserved, the informal nature of mediation, which is key to a successful resolution,[52] will be diminished.[53] In

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[45] *See id.* (asserting that "[t]he efficacy of this factfinding process depends on the mediator's ability to ensure the confidentiality of communications made to him").

[46] *Id.* at 444 (citations omitted).

[47] Quid pro quo sexual harassment is the exchange of sexual conduct for a tangible employment benefit (e.g., sexual intimacy for a raise). *See* Michael J. Zimmer et al., CASES AND MATERIAL ON EMPLOYMENT DISCRIMINATION 627 (Richard A. Epstein et al. eds., 4th ed. 1997).

[48] *See* Silberman et al., *supra* note 1, at 1538 (noting that mediation is well suited to cases in which confidentiality may be important to the complainant, like in a sexual harassment case).

[49] *See* Note, *supra* note 21, at 445.

[50] *Id.* at 444.

[51] *Id.*

[52] *See* GOLDBERG ET AL., *supra* note 8, at 4 (using a chart to note that mediation and

a unionized workforce, the mere presence of a union representative, who is present as a representative of the interests of the entire bargaining unit, may make the mediation longer, more complex, and thus more costly in time spent by the employees in the mediation and in fees to the mediator. Thus, although management and the employee are trying to get their problems resolved quickly and get back to work, the presence of a union representative, who has his own agenda, may hinder these goals.

Furthermore, the presence of a union representative may shift the focus of the mediation from the interests of the parties to the interests of the entire bargaining unit.[54] Such a result is undesirable because a successful mediation focuses on the interests of the individuals involved by getting those individuals to discuss their problems and interests, not the problems and interests of an entire bargaining unit.[55]

III. CURRENT REPRESENTATIONAL RIGHTS AS INTERPRETED BY THE NLRA AND COURTS

The NLRA[56] affords unions the right to represent union members at the adjustment of grievances. This representational right has been interpreted by the NLRB[57] as giving to unions an absolute right to be present in mediations even when significant individual rights are implicated, as in discrimination complaints. What follows is one NLRB decision and a federal circuit court case explaining why they believe the union's representational right is without limitation.[58]

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negotiation are informal and unstructured, whereas litigation is formalized and highly structured, and arbitration is procedurally less formal); Stipanowich, *supra* note 2, at 85 (noting that one explanation for mediation's popularity is because it is informal and flexible).

[53] *See* GOLDBERG ET AL., *supra* note 8, at 152 (noting that in a small claims mediation in Maine, the greater the informality of the mediation, the less intimidating it is, and noting that informality creates greater potential for reducing anger in mediation than litigation).

[54] *See supra* notes 18–20 and accompanying text.

[55] *See supra* notes 16, 22 and accompanying text.

[56] *See* National Labor Relations Act, 29 U.S.C. §§ 151–169 (1994 & Supp. III 1997).

[57] The Board is a three-member panel to which the NLRA delegates authority to decide labor issues. *See id.* § 153(a)–(b).

[58] These cases do not deal specifically with mediations. Rather, they deal with EEO precomplaint conciliations (in which mediations took place) or informal meetings where a settlement was reached between the employer and employee outside the presence of the union. Both are analogous to mediation.

Additionally, there are two cases laid out that deal strictly with the right of an employer to keep confidential the names of employees who have filed discrimination-related complaints with their employer. Although not dealing directly with the union's right to be present at the adjustment of a grievance, these cases do address majoritarian and individual rights and hold that individuals do have some privacy rights over the union.

A. *NLRB and Court Decisions on the Union's Representational Rights*

Section 9(a) of the NLRA allows individual employees or a group of employees to approach their employer and have a grievance adjusted.[59] It is therefore permissible for the employer to set up a mediation program for employees to use when they have a discrimination-related grievance. This proposition is supported not only by the language of the NLRA but also by the decisions in *NLRB v. North American Aviation, Inc.*,[60] in which it was held that the employer corporation had a right, if not a duty, to hear and settle any grievance presented to it,[61] and *Hughes Tool Co. v. NLRB*,[62] in which it was held that section 9(a) does not give the union the exclusive right to handle grievances.[63] During these settlements of grievances with the

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A precomplaint conciliation, informal meeting, and mediation outside the presence of a union all have the potential to result in the adjustment of a grievance and therefore are targeted by section 9(a) of the NLRA.

[59] *See* 29 U.S.C. § 159(a). See *supra* note 29 for the full text of this statute.

[60] 136 F.2d 898 (9th Cir. 1943).

[61] *See id.* at 898. In this case, North American Aviation had informed its employees that they could present any grievance to it and if no agreement was reached, they could go to arbitration. The union claimed that, pursuant to the NLRA, it had a monopoly over the treatment of grievances. *See id.* at 898–99. The court stated in a footnote:

> It is well to appreciate that [the proviso of § 159(a)] is on its face a right preserved to the employee. No doubt the reason for this is that under the scheme of collective bargaining a bare majority controls the whole body of employees and that, in this circumstance, the right should be preserved, to the individual (or a group) to go to his employer with any grievance he may harbor notwithstanding any provision in the collective agreement.
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> It may also be that the Congress intended, by this proviso, to assert the policy that individuals or a group of individuals in spite of any agreement to the contrary may possess the right of registering their grievances with the employer.

Id. at 899 n.2.

[62] 147 F.2d 69 (5th Cir. 1945).

employer, the NLRB and courts also have allowed the employee to sign away all of her rights arising out of the grievance.[64]

The second proviso of section 9(a), however, states that the union representative must be afforded an opportunity to be present at the adjustment.[65] Because the first proviso allows the employee to approach his employer, employers have argued that section 9(a) actually gives them the right to adjust a grievance even in the union's absence. The NLRB in the following cases, however, has rejected this argument by strictly construing section 9(a) and finding that the majoritarian rights of the union are important and take precedence over individual rights.

1. Bethlehem Steel Company

In *Bethlehem Steel Company*,[66] the union brought an action against Bethlehem Steel Company (Bethlehem Steel) for a violation of section 8(a)(5) of the NLRA.[67] The union alleged that Bethlehem Steel was in violation of the statute because it conditioned the execution of a contract on the union's agreement to incorporate a clause permitting the union representative to be present at the initial adjustment of grievances only if the employee so requested.[68] This dispute was the sole unresolved issue of the parties' 1947 contract negotiations.[69]

Since Bethlehem Steel refused to accept the agreement without the clause, the union signed with the understanding that it would go before the

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[63] *See id.* at 73. It was held that the union had the exclusive right only where the grievance involves bargaining for the unit or the interpretation of a bargaining agreement. *See id.* at 72–73.

[64] In *United States Postal Serv. & Nat'l Alliance of Postal & Fed. Employees Local 321*, 234 N.L.R.B. 820 (1978), the NLRB allowed an agreement to settle a dispute between the United States Postal Service and an employee that waived all rights to grieve, to appeal to the Civil Service Commission, the EEOC, or the Veterans Preference Act. *See id.* at 821. Because the employee did not agree to give up a protected concerted activity, the panel found that the Postal Service, "in imposing such a condition on [the employee] in exchange for reducing the discharge to a suspension, sought merely to 'buy its peace' by preventing [the employee] from litigating the matter in the future." *Id.* at 821.

[65] *See* National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1994).

[66] Bethlehem Steel Co., Shipbuilding Div., 89 N.L.R.B. 341 (1950).

[67] *See* 29 U.S.C. § 158(a)(5). This section states that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." *Id.*

[68] *See Bethlehem Steel Co.*, 89 N.L.R.B. at 341.

[69] *See id.* at 341–42.

NLRB.[70] The trial examiner,[71] relying on the second proviso of section 9(a), found that the union had a statutory right to be present at the adjustment of grievances by any agent of the employer, and that Bethlehem Steel could not insist on a clause that was in derogation of the union's right under the NLRA.[72] It was up to the union if it wanted to waive its right. The NLRB agreed and stated:

> Grievances are usually more than mere personal dissatisfactions or complaints of employees and their adjustment frequently involves the interpretation and application of the terms of a contract or otherwise affects the terms and conditions of employment not covered by a contract. For this reason, these matters are unquestionably the concern of the bargaining representative.[73]

The NLRB also stated that a grievance procedure is bargainable.[74] Thus, a union can bargain away its right to be present in the adjustment of certain grievances between the employer and employee.[75] The union cannot, however, be forced to limit or give up its right.[76] Therefore, the union, because of its duty to represent the majority, as opposed to the minority, retains in this NLRB decision its power under section 9(a) to be present at the adjustment of individual grievances between the employer and employee.[77]

2. United States Postal Service & American Postal Workers Union

One of the most significant NLRB decisions dealing with the rights of individuals to settle their disputes in a confidential manner and the right of the bargaining unit to be represented in settlement proceedings is *United States Postal Service and American Postal Workers Union, Columbus Area*

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[70] *See id.* at 342.

[71] The trial examiner is the person who issues an intermediate report.

[72] *See Bethlehem Steel Co.*, 89 N.L.R.B. at 342.

[73] *Id.* at 344 (citations omitted).

[74] *See id.* at 345.

[75] The court in *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 75 (5th Cir. 1945), also held that the Hughes Tool Company did not need to notify the union when an employee presented grievances to foremen. *See id.* at 75. This was so held because the contract of the union agreed that it did not need notification of grievances to foremen. *See id.* at 72, 75.

[76] *See Bethlehem Steel Co.*, 89 N.L.R.B. at 342.

[77] *See id.*

Local.[78] In this consolidated case, the Columbus Area Local and the Phoenix Area Local Unions brought suits against the United States Postal Service for violation of sections 8(a)(1)[79] and 8(a)(5)[80] of the NLRA.

In the Phoenix Area Local Union case, four employees received formal notification from their employer that their performance on a letter sorting machine was unsatisfactory and that if they did not pass a required examination within 30 days, they would lose their jobs.[81] Each employee, claiming discrimination, initiated both the union's grievance procedure and the EEO complaint procedure.[82]

One of the four employees withdrew her complaint from the grievance procedure and settled with the EEO counselor.[83] The others submitted their grievance to arbitration and entered settlement talks with the counselor. One of the three denied the EEO settlement offer.[84] Two accepted the EEO settlement. Each woman was offered the right to have a representative present; however, the union was not contacted and did not attend the meetings.[85] In each case, the USPS stated that it would reserve the right to assert the EEO settlement as a defense in any arbitration of the employee's grievance.[86]

In the Columbus Area Local Union case, a manual distribution clerk received a parking ticket for parking in an unauthorized zone and, as a result, received a five-day suspension without pay.[87] She asserted that the ticket and suspension were unfair and discriminatory, and she invoked the EEO procedures and filed a grievance. She settled through the EEO procedures without the presence of the union.[88] When the employee's grievance entered

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[78] 281 N.L.R.B. 1015 (1986).

[79] *See* National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1994) (providing that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title").

[80] *See id.* § 158(a)(5) (providing that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representation of his employees, subject to the provisions of section 159(a) of this title").

[81] *See United States Postal Serv. & Am. Postal Workers Union*, 281 N.L.R.B. at 1021.

[82] *See id.*

[83] *See id.* at 1022.

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See id.*

arbitration, the arbitrator agreed with the USPS that the settlement barred him from hearing the case.[89]

Siding with the plight of the unions and the unions' duty to represent the entire bargaining unit, the NLRB decided that the USPS violated the NLRA "[b]y adjusting or attempting to adjust contract grievances with individual unit employees without affording the employee's collective-bargaining representative the opportunity to be present at such adjustments as required by section 9(a) of the Act...."[90] After balancing privacy rights in precomplaint meetings under the EEO regulations against the explicit language of section 9(a), the Board held that the NLRA (bargaining unit rights) prevails over the EEO regulations (individual rights).[91]

Calling special attention to the second proviso of section 9(a), the NLRB held that the explicit language of the NLRA secures the bargaining representative's right to be present, without limitation, when a grievance is being adjusted.[92] First, it noted that the "legislative history and the entire statutory bargaining scheme disclose that the second proviso to Section 9(a) was inserted in recognition of the bargaining representative's interest in administering its contract."[93]

The NLRB also stated that by adding in the second proviso of section 9(a), Congress expressed an intent that the institutional role of the collective-bargaining unit not be subordinated to individual employees.[94] In establishing this "regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strengths and bargaining

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[89] *See id.*

[90] *Id.* at 1018.

[91] *See id.* at 1016.

[92] *See id.* at 1015.

[93] *Id.*

[94] *See id.* The NLRB went on to reference *Bethlehem Steel Co., Shipbuilding Div.*, 89 N.L.R.B. 341 (1950). *See United States Postal Serv. & Am. Postal Workers Union*, 281 N.L.R.B. at 1015. The NLRB noted that "the dangers of permitting an employee, or a group of employees, the unqualified right to present and settle grievances" were set out in the House of Representative debates on section 9(a), as follows:

> To grant individual employees or a minority group of employees the right to present and settle grievances which relate to wages, hours, and conditions of employment, without permitting the representative of the majority of the employees to participate in the conference and join in any adjustment is to undermine the very foundations of the Act.

Id. at 1015–16 (quoting 93 CONG. REC. 3624 (1947) (statement of Rep. Lanham)).

power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority."[95]

Second, the NLRB found that the rationale for the anonymity requirement was not applicable in this case. According to the NLRB, the reason for anonymity is to protect the identity of the employee from management, not the union.[96] In this case, the employees initiated the EEO procedure concomitantly with the union procedure; thus, the union was already aware of the identities of the aggrieved employees. Accordingly, the NLRB stated that "whatever validity the confidentiality requirement may have in general, we do not find that it is sufficient to outweigh the Union's clear statutory rights set forth in Section 9(a) of the Act."[97]

All of the employees in this case filed grievances with the union. The NLRB's holding addressed situations where the employee invoked both the EEO and union grievance procedures. Notably, the court explicitly stated in a footnote that it had not decided whether the union would have a right to be present at the adjustment of a grievance with an individual employee who did not also file a contract grievance.[98]

B. *Court Decisions on Employees' Confidentiality Rights*

In contrast to the preceding administrative adjudications, the following federal circuit court cases upheld the privacy rights of the employee against the majoritarian rights of the collective bargaining unit. However, these cases do not deal directly with representational rights. Instead, they compare the union's right to obtain access to the names of discrimination complainants with the confidentiality rights of the individual employees.

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[95] *Id.* at 1016 n.7 (quoting Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975) (citing Vaca v. Spies, 380 U.S. 171, 182 (1967); J.I. Case Co. v. NLRB, 321 U.S. 332, 338–39 (1944); H.R. Res. 972, 74th Cong. (1934))).

[96] *See id.* at 1016. The NLRB also noted that some of the employees who filed contract grievances were not concerned with remaining anonymous to postal management because they made direct contact with the Postmaster concerning the complaints. *See id.* at 1016 n.9.

[97] *Id.* at 1016.

[98] *See id.* at 1018 n.13; *see also* Van Can Co., 304 N.L.R.B. 1085, 1087 (1991) (stating that when a manager telephones an employee and makes a settlement without extending to the union an opportunity to be present, the employer violates the NLRA); Top Mfg. Co., 249 N.L.R.B. 424, 425 (1980) (noting that where an employer settles with an employee after his grievance is adjusted through the union without notifying the union, the employer violates the NLRA).

1. International Union of Electrical Radio & Machine Workers v. NLRB

In *International Union of Electrical Radio & Machine Workers v. NLRB*,[99] the Union, during a negotiation of the collective bargaining agreement, requested that General Motors Corporation (GM) hand over a list of all discrimination complaints filed against GM.[100] GM furnished the Union with a listing of the number of complaints as well as the sex and race of each complainant and the general subject matter of their complaints. The Union demanded more detailed data but GM failed to respond.[101] The Union then filed a charge against GM, and the NLRB found that GM had violated the NLRA by failing to provide the information requested by the Union.[102]

On appeal to the United States Court of Appeals for the District of Columbia, the court considered, in part, whether the NLRB's conclusion that GM's refusal to supply copies of discrimination complaints filed by union-represented employees was an unfair labor practice. The court found that the union did have a right to certain information, namely, information pertaining to the type and frequency of complaints, because it would enable the union to "properly negotiate and perform their agreement-created duties under the anti-discrimination clauses."[103] The court also found, however, that the union did not have a right to the actual copies of the complaints which held the name of the complainant and that the actual copies were not necessary to provide the requested information.[104] The court, recognizing the importance of employees' feelings of comfort in filing confidential complaints, stated:

> The Union seeks copies of complaints from the employer because the complaining union member, presumably, has elected not to involve his union. The filing of complaints would be inhibited if employees knew their

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[99] 648 F.2d 18 (D.C. Cir. 1980).

[100] *See id.* at 21.

[101] *See id.* at 21–22.

[102] *See id.* at 22.

[103] *Id.* at 25.

[104] *See id.* at 27. In so holding, the court relied on the United States Supreme Court's holding in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). In *Detroit Edison*, the Court held that "[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice." *Id.* at 318.

complaints would be given to a local union representative or fellow union member who, in some cases, might be the very subject of the complaint. [105]

The court further found that inhibiting the filing of employee complaints and thus inhibiting the social progress for which the complaint procedure strives is contrary to congressional intent[106] as set forth in Title VII of the Civil Rights Act of 1964 and the EEOC regulations that prohibit public officials from making complaints public.[107]

2. Safeway Stores, Inc. v. NLRB

The United States Court of Appeals for the Tenth Circuit in *Safeway Stores, Inc. v. NLRB*[108] reached a result similar to that reached by the District of Columbia Circuit in *International Union of Electric Radio & Machine Workers.* This case was on appeal from an NLRB order requiring Safeway Stores, Inc. (Safeway) to provide the Union with information concerning race and employment status.[109] The Union requested the information to ensure that the company was complying with the nondiscrimination requirements of the bargaining agreement.[110]

As a bargaining unit, the court stated, a union is entitled to information which is relevant to its duty to administer the collective bargaining agreement.[111] The test for relevancy is a liberal one; if the information would aid the union in performing its statutory duties, it is relevant.[112] However, the court stated that "[e]ven when the information is objectively relevant, . . . a union's request may be denied if its compilation would be unduly burdensome or if the employer's interest in its confidentiality

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[105] *International Union of Elec. & Mach. Workers*, 648 F.2d at 27.

[106] *See id.*

[107] *See id.* The court stated that "[t]he board's dismissal of these provisions, merely on the ground that they do not bind private citizens, did not . . . pay sufficient deference to the public policy underlying those provisions." *Id.* The court went on to state that the conclusion that a union can force an employer to do what the law prohibits of public officials is unwarranted. Such a conclusion, according to the court, would nullify the protection of union member complainants intended by Title VII and EEOC regulations. *See id.*

[108] 691 F.2d 953 (10th Cir. 1982).

[109] *See id.* at 953.

[110] *See id.* at 956.

[111] *See id.*

[112] *See id.*

outweighs the union's interest."[113] Thus, according to this court, even if the union's request was made pursuant to its statutory duty to enforce the collective bargaining agreement, if the confidentiality interest outweighs the union's interest then majoritarian rights are subordinated to individual rights.[114]

International Union of Electrical Radio & Machine Workers and *Safeway Stores* at first glance appear to support the proposition that section 9(a) representational rights should be limited when it comes to privacy in discrimination-related proceedings. If it does, however, it does so in an indirect way. Proponents of majoritarian rights will argue that these cases do not deal with section 9(a) representational rights and thus do not allow employers to keep unions out of mediations. Advocates of individual rights, on the other hand, will argue that these holdings imply that individuals have confidential rights when participating in any discrimination procedure outside the union process and that if the union has any rights, it is the right to know how many complaints were filed and other general information.

C. *Summary*

The NLRB decisions and circuit court cases have set out the following: (1) that the employee, pursuant to section 9(a), can approach management with a grievance and that management can adjust that grievance as long as it does not contradict the collective bargaining agreement; (2) that the settlement between the employer and employee can waive all of the employee's rights coming out of the particular grievance; (3) that the union can waive its right to be present at grievances; and (4) that the employer can hold in confidence the names of the employees who have filed complaints with management to protect those employee's privacy rights. Thus, the NLRB and court cases have recognized, to some small degree, that individual employees do have a right to settle grievances and that they have the right to keep in confidence their discrimination complaints.

However, the NLRB still holds that pursuant to section 9(a) a union

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[113] *Id.*

[114] *Safeway* differs from *International Union of Electrical Radio & Machine Workers* slightly. *Safeway* states that it is okay simply to erase the names of the complainants. *See id.* at 958. In *International Union of Electrical Radio & Machine Workers*, the court states that deletion of the names is not enough. *See International Union of Elec. Radio*, 648 F.2d at 26. "The mere deletion of complainant names . . . does not sufficiently insure the confidentiality of their complaints. In many instances a reading of the complaint would allow one familiar with the work environment to identify the complainant." *Id.*

representative has a right to be present at the adjustment of grievances. Consequently, mediations implemented by an employer of a unionized workforce may suffer from the lack of a major element: confidentiality. As a result, the mediations will be focused less on the individual parties and how they feel and more on finding a solution that will benefit the entire bargaining unit. Furthermore, the mediations might lose their informal nature.[115] What likely will result is an alteration in the nature of mediation. Where unions are involved, mediation will not look like the interest-based ADR procedure that ADR scholars support and therefore will lack the results of a pure mediation program.[116]

Although this paints a bleak picture for employer-initiated mediation programs in union settings, hope still remains. There is a loophole in the NLRB's decision in *American Postal Worker's Union*, in which the Board held that there is no need for confidentiality when the employee invokes both the EEO and union grievance proceedings.[117] The NLRB found, in part, that because the Union was already aware of the identities of the grievants, whatever validity confidentiality might have was sufficient to outweigh the union's statutory rights under section 9(a). The NLRB explicitly stated that it was not considering the scenario where an employee had not invoked both the EEOC and the union grievance proceedings. Thus, the NLRB's holding in *United States Postal Service & American Postal Workers Union* is inapplicable in situations where an employee submits to a mediation without invoking the union procedure.[118] This fact that the employer could keep the names of the complainants confidential, taken together with the holdings in *International Union of Electric Radio & Machine Workers* and *Safeway*

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[115] *See supra* notes 52–53 and accompanying text.

[116] *See supra* Part II.

[117] *See* United States Postal Serv. & Am. Postal Workers Union, 281 N.L.R.B. 1015, 1016 (1986).

[118] *See id.* at 1026. The Administrative Law Judge (ALJ), who was overruled by the NLRB in *International Union of Electric Radio & Machine Workers*, did consider situations in which the employee had not invoked both the EEO and union grievance procedures. *See id.* The ALJ held that

> to read Section 9(a) of the Act as broadly as the General Counsel argues would require that the Postal Service give the Union the right to be present at all EEO pre-complaint sessions even when the individual is asserting no contract violation and opposes the Union's presence. I do not believe that the EEO process mandated by Title VII and the EEOC regulations—with the specific admonition to the Postal Service to guard the anonymity of the complainant—could easily survive such mandatory participation by the Union without significant risk of altering its nature and function.

Id.

Stores, may be helpful, initially, in persuading the Board and courts to reconsider confidentiality in pregrievance mediation.

Something stronger than loopholes in an NLRB decision and indirect court decisions, however, will be needed to persuade fully the NLRB and courts to limit a union's statutory representational right in discrimination-related mediation. The following Part lists three such arguments.

IV. THE UNION'S REPRESENTATIONAL RIGHTS SHOULD BE LIMITED IN FAVOR OF THE EMPLOYEE'S RIGHT TO CONFIDENTIALITY

There is strong precedent from the NLRB and clear language in section 9(a) that supports an unlimited representational right for unions. To overcome this precedent and language, employers and employees must argue that employees have a statutory and public policy right that limits the union's representational guarantees. The following discussion lays out three arguments that should persuade the NLRB and courts, when weighing the union's statutory rights against any rights the employee may have, to tip the balance in favor of confidentiality for the employees.

The first argument revisits the continuing debate over the individual right to pursue the resolution of discrimination claims outside of the union process and the institutional obligation of the union to represent the entire bargaining unit. The United States Supreme Court and lower court case law emphasize congressional intent to protect individual rights, as opposed to majoritarian rights, under Title VII. If the Supreme Court recognized that individuals can pursue their Title VII claims outside the union process in federal court, then no reason exists for denying individuals the right to mediate their discrimination claims outside of the union process and without the union's presence. This argument has become particularly compelling since the passage of the Civil Rights Act of 1991, in which Congress expressly endorses alternative dispute resolution to resolve discrimination disputes.[119]

Second, the public equivalent of the NLRB, the Federal Labor Relations Authority (FLRA), which is controlled by the Federal Service Labor Management Relations Statute (FSLMRS),[120] has held that the individual right to grieve discrimination complaints through the EEOC trumps majoritarian rights, and thus union representatives cannot force themselves

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[119] *See* Civil Rights Act of 1991 § 118, 42 U.S.C. § 1981 note (1994 & Supp. III 1997) (Alternative Means of Dispute Resolution).

[120] 5 U.S.C. §§ 7101 *et seq.* (1994 & Supp. III 1997).

into precomplaint meetings.[121] Following congressional intent that individuals have special rights to pursue discrimination claims, the FLRA has held that an employee's right to confidentiality is upheld against the right of the union to be present.[122] The argument, therefore, is that if public employees have a right to a confidential discrimination-related mediation, then private employees who, like public employees, benefit from Title VII guarantees, should also have the right. There is no reason to have separate policies.

Third, there is an apparent conflict between the ADRA confidentiality clauses[123] and the representational rights of the union. Because the USPS, controlled by the NLRA,[124] is a federal agency, it must comply with the ADRA's mandate that it attempt to resolve controversies through ADR processes instead of resorting to the overcrowded court system. In complying with the ADRA, the USPS must keep mediation communications confidential. Therefore, as long as the USPS's mediation program is in compliance with the ADRA, the USPS has a statutory duty, and USPS employees have a statutory right, to keep mediations confidential.

A. *Expanding Individual Rights to Discrimination-Related Mediations*

Pursuant to the NLRA, a majority of the employees in a unit can elect a representative who will have the exclusive right to bargain with the employer on that unit's behalf.[125] By creating this system of employee organization and collective bargaining, Congress intended to "promote industrial peace and the improvement of wages and working conditions."[126] Consequently, the interests of individual employees will be subordinated to the collective interests of the majority.[127] Additionally, Congress and the Supreme Court have developed a policy favoring the use of arbitration as the

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[121] *See* Peter Marksteiner, *How Confidential Are Federal Sector Employment-Related Dispute Mediations?*, 14 OHIO ST. J. ON DISP. RESOL. 89, 105–41 (1998) (discussing, inter alia, IRS, Fresno Serv. Ctr. v. FLRA, 706 F.2d 1019 (9th Cir. 1983)).

[122] *See id.*

[123] *See* Administrative Dispute Resolution Act of 1996 § 3, 5 U.S.C. § 574 (1994 & Supp. IV 1998).

[124] The USPS is covered by the NLRA pursuant to the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (codified in scattered sections of 2, 3, 5, 12, 15–18, 22, 31, 39, 40, 42 U.S.C.).

[125] *See* National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1994).

[126] Vaca v. Sipes, 386 U.S. 171, 182 (1967).

[127] *See id.*

dispute resolution process of unionized workforces.[128] Although Congress and the Supreme Court have promoted majoritarian rights and arbitration in the unionized workforce, they also have recognized explicitly an independent right to pursue statutory claims outside of the union's grievance and arbitration process and without union representation.[129] Thus, where an employee feels that he has been discriminated against, the majoritarian rights of the bargaining unit do not prevail against him, and he therefore may go outside of the union process to seek resolution of his claim.

It was in *Alexander v. Gardner-Denver Co.*[130] that the Supreme Court compared the rights of the majority to those of the individual in a discrimination claim. In performing such a comparison, the Court stated that Title VII rights are different and separate from the section 9(a) rights of the union. Specifically, the Court stated that Title VII "stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities."[131]

Gardner-Denver dealt with a unionized employee's right to bring a claim in federal court after going through the union arbitration process. The Court held that an employee's statutory right to trial de novo is not foreclosed by prior submission to final arbitration under a collective bargaining agreement.[132] Thus, the employee can, outside of the union process and without union representation, take his discrimination claim to federal court. The Court so held because Title VII "make[s it] plain that federal courts have been assigned plenary powers to secure compliance with Title VII."[133]

Since the Supreme Court's decision in *Gardner-Denver*, Congress has amended Title VII to include alternative dispute resolution, in addition to

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[128] *See* Joshua J. Morrow, Austin v. Owens-Brockway Glass Container, Inc.: *Shattering Discriminated Union Members' Choice of Judicial Forum*, 14 LAB. LAW. 143, 144 (1998). The Supreme Court developed this policy in the Steelworker Trilogy. *See generally* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[129] *See* McDonald v. City of West Branch, Mich., 466 U.S. 285–92 (1984) (holding that claims under 42 U.S.C. § 1983 are not precluded by compulsory arbitration); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728–45 (1981) (holding that claims under the Fair Labor Standards Act are not precluded by compulsory arbitration); Alexander v. Gardner-Denver Co., 415 U.S. 36, 59–60 (1974) (holding that claims under Title VII are not precluded by compulsory arbitration).

[130] 415 U.S. 36 (1974).

[131] *Id.* at 51.

[132] *See id.* at 59–60.

[133] *Id.* at 45.

litigation, as a statutory remedy.[134] Therefore, in accordance with the reasoning of *Gardner-Denver*, employees now have a congressionally mandated statutory right to submit, if they want, to ADR outside of the union grievance process and without union representation. Even before this amendment, Title VII gave employees a significant role in pursuing their own discrimination claims before turning to the courts: "Individual grievants usually initiate the [EEOC's] investigatory and conciliatory [mediation] procedures. . . . In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."[135] An employee, therefore, even before the amendment, could carry out the purposes of the Act by "redress[ing] his *own* injury" in a conciliatory meeting or mediation before having to resort to court.

In finding that Congress favors individual rights in the discrimination context, the Supreme Court and lower federal courts have pointed to, among others, the following two reasons that the union cannot interrupt or prevent individual employees from pursuing their own discrimination claims: (1) contractual rights and statutory rights are separate and distinct, and (2) the union cannot waive, in a bargaining agreement, an employee's statutory right.

In *Gardner-Denver*, the Supreme Court stated that when an employee submits her grievance to arbitration, the employee is seeking to vindicate her contractual right under the collective-bargaining agreement.[136] By contrast, when filing a suit under Title VII, the employee is seeking to exercise her independent statutory right accorded by Congress.[137] And, expanding the argument to the 1991 amendments, when submitting to mediation or another ADR process outside of the union's grievance and arbitration procedure, the employee also seeks to exercise a statutory, not contractual, right.

The argument over the contractual and the statutory right is an argument

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[134] *See* Civil Rights Act of 1991 § 118, 42 U.S.C. § 1981 note (1994 & Supp. III 1997) (Alternative Means of Dispute Resolution). Section 118 of the Civil Rights Act of 1991 states: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." *Id.*; *see also* Silberman et al., *supra* note 1, at 1533 (noting that Congress's endorsement of ADR in Title VII "indicates a significant shift in congressional and public attitudes about the adequacy and effectiveness of" ADR).

[135] *Gardner-Denver*, 415 U.S. at 45 (citing Civil Rights Act of 1964 § 706, 42 U.S.C. § 2000e-5(f)(1) (1970 & Supp. II 1972) (amended 1991)).

[136] *See id.* at 49.

[137] *See id.* at 49–50.

over majoritarian and individual rights. The contractual right is the "reality of a majoritarian conception of workers' rights,"[138] whereas the statutory right is designed to provide "minimum substantive guarantees to individual workers."[139] Because there are differing policies behind these rights and because Title VII's policy expresses special rights for individuals, it is up to the individual if he wants to pursue his claim as a contractual right or as a statutory right.[140] Pursuant to *Gardner-Denver*, his choice of forum—court or private mediation—trumps the majority.[141]

In *Pryner v. Tractor Supply Co.*,[142] the opinion for which was written by Chief Judge Richard Posner, the Seventh Circuit held that an employee's statutory rights are subject to the union's process only when the employee consents.[143] The union, therefore, cannot "consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement."[144] Thus, the employee is free to go outside of the "union-controlled grievance machinery" to seek resolution of his discrimination claim in an employer-initiated mediation.

The Eleventh Circuit in *Brisentine v. Stone & Webster Engineering Corp.*,[145] like the *Pryner* court, held that an employee cannot be stopped from pursuing his statutory claim in court unless he, not the union, decides to

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[138] Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997).

[139] Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 737–38 (1981).

[140] *See Gardner-Denver*, 415 U.S. at 49.

[141] *See id.*

[142] 109 F.3d 354 (7th Cir. 1997).

[143] *See id.* at 363; *see also* Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1431 (10th Cir. 1997) (holding that an employee does not have to complete the union grievance process before bringing discrimination claims); Varner v. National Super Mkts., Inc., 94 F.3d 1209, 1213 (8th Cir. 1996) (holding that an employee who has chosen not to participate in the union grievance procedure but completely to move outside of the that process can do so rightfully to pursue her Title VII claim).

[144] *Pryner*, 109 F.3d at 363 (emphasis omitted). The court also stated:

> The essential conflict is between majority and minority rights. The collective bargaining agreement is the symbol and reality of a majoritarian conception of workers' rights. . . . The statutory rights at issue in these two cases are rights given to members of minority groups because of concern about the mistreatment . . . of minorities by majorities. . . . [W]e may not assume that [the union] will be highly sensitive to their special interests, which are the interests protected by Title VII . . . .

Id. at 362.

[145] 117 F.3d 519 (11th Cir. 1997).

arbitrate the claim.[146] The court stated that because the statutory right was designed to provide guarantees to individual employees and the union was designed to protect the majority, the union could not waive an individual employee's right to bring an action in federal court.[147] Thus, the employee has a right to pursue her own discrimination complaint without union participation or representation.[148]

Against this strong congressional and judicial support for the individual right to go outside of the union process to resolve discrimination claims, opponents of individual rights have argued that the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[149] overrules *Gardner-Denver* and takes away the employee's right to choose statutory over contractual rights.[150] Those opponents, however, are wrong.[151]

In *Gilmer*, the Court held that an employee could be compelled to arbitrate her statutory claim under the Age Discrimination in Employment Act (ADEA).[152] The Supreme Court took special care to distinguish *Gilmer* from *Gardner-Denver*. It held that *Gardner-Denver* dealt with a bargaining-unit employee who was compelled to arbitrate under a collective bargaining agreement and not under an employment contract.[153] Under the bargaining agreement, the Court noted, the employee does not personally agree to arbitrate, as under an employment contract, nor does the employee have representation by his own personal advocate.[154] Thus, although the Court held that an employee who agrees to arbitrate under an employment contract must arbitrate, bargaining unit employees, whose union has agreed to arbitrate discrimination claims, still can go outside of the union process to resolve their discrimination claim.[155]

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[146] *See id.* at 526–27. The court also stated that the employee could not be prevented from bringing suit in court if the arbitrator was not specifically authorized to resolve federal statutory claims or if the agreement gives the employee the right to pursue an arbitration if the claim is not resolved in the grievance process. *See id.*

[147] *See id.* at 537.

[148] *See id.*

[149] 500 U.S. 20 (1991).

[150] *See id.* at 35.

[151] *See infra* note 155 and accompanying text.

[152] *See Gilmer*, 500 U.S. at 23; *see also* Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1994 & Supp. III 1997).

[153] *See Gilmer*, 500 U.S. at 35.

[154] *See id.*

[155] *See* Morrow, *supra* note 128, at 149. Although the Supreme Court in *Gilmer* was clear that it was not overruling *Gardner-Denver*, one circuit court, the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), has held

Thus, after *Gilmer*, there is Supreme Court support, in addition to congressional support and lower federal court support, for individual rights under Title VII that are separate and distinct from the majoritarian rights that section 9(a) of the NLRA strives to protect. Through the Civil Rights Act of 1991, Congress has extended to bargaining unit employees the right to resolve their discrimination claims, if they so choose, in mediation and other ADR processes outside of the union's grievance and arbitration process. The NLRB therefore must abandon its precedent and hold that in employer-initiated mediations dealing with discrimination, the union's section 9(a) right succumbs and allows an employee, if he elects, to move outside of the union process and deny union representation. As stated in *National Treasury Employees Union v. Federal Labor Relations Authority*[156]:

> Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. Title VII . . . provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit. . . . Similarly, a direct conflict between the rights of an exclusive representative . . . and the rights of an employee victim of discrimination should also presumably be resolved in favor of the latter.[157]

Allowing the union to succumb will ensure that the employee has a full opportunity to pursue her statutory right to combat discrimination unencumbered by the union representative's motives[158] and to take advantage of her right to confidentiality which is essential to a successful mediation.

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that *Gilmer* did overrule *Gardner-Denver* and that union employees no longer can choose statutory rights over contractual rights. *See id.* at 880; *see also* 137 CONG. REC. H9505, 9530 (daily ed. Nov. 7, 1991) (statement of Sen. Edwards) (stating that there is no approval of *Gilmer*); Morrow *supra* note 128, at 160 (concluding that "[u]ntil the Supreme Court or Congress say [sic] otherwise, lower courts should follow *Gardner-Denver* and rule that an employee's rights under a [collective bargaining agreement] are independent of statutory rights and that an employee may choose to sue under either or both rights").

[156] 774 F.2d 1181 (D.C. Cir. 1985). This case deals with a public union under the FSLMRS.

[157] *Id.* at 1189 n.12 (emphasis omitted).

[158] The union's motives are to represent the entire bargaining unit rather than just the individual employee. *See supra* note 23 and accompanying text.

B. *The NLRB Should Follow the FLRA's Decisions Upholding Individual Rights over Majoritarian Rights*

Finding great weight in individual rights under Title VII, the FLRA has held that union representatives do not have the right to attend informal EEO precomplaint meetings (in which mediations take place).[159] The FSLMRS, under which the FLRA operates, regulates public unions in virtually the same manner as the NLRB regulates private unions. Like the NLRA, the FSLMRS does not have an exception to the union's representational rights for confidential mediations.[160] The Authority, however, has carved out such an exception.[161]

One difference between the two acts centers around their provisions for union representation. The FSLMRS states that the union shall have an opportunity to attend "any formal discussion between one or more representatives of the agency and one or more employees in the unit . . . concerning any grievance or any personnel policy or practices or other general condition of employment."[162] The NLRB does not state that the discussion needs to be formal, just that the union should have an opportunity to be present where there is an adjustment of a grievance.[163]

In a study of the FSLMRS and the right to confidentiality in mediation, it was found that "[a]t least two circuit courts and the [FSLRA] have stated in dicta that in the event of a conflict between an EEO complainant's right to exclude the union from settlement discussion and a union's right to be present, . . . the EEO complainant's privacy rights trump the union's representational rights."[164]

In *Columbia Typographical Union No. 101*,[165] a unionized employee filed an EEO complaint alleging sexual discrimination. As in the NLRB decision discussed in Part III of this note, the employee settled with the EEO officer.[166] The union did not have notice of the settlement.[167] The union brought suit against the company stating that it improperly negotiated with a

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[159] *See* Marksteiner, *supra* note 121, at 105–41.

[160] *See id.*

[161] *See id.*

[162] 5 U.S.C. § 7114(a)(2)(A) (1994).

[163] *See* Marksteiner, *supra* note 121, at 110.

[164] *Id.* at 142.

[165] 23 F.L.R.A. 35 (1986).

[166] *See id.* at 35–36.

[167] *See id.* at 45. The settlement occurred on March 23. The union received notice of the settlement on March 28. *See id.*

unionized employee during the informal adjustment of her EEO complaint.[168] In response to the suit, the FLRA stated that individual employees have a right to participate in the informal adjustment of their complaint.[169] It then quoted the U.S. Court of Appeals for the District of Columbia Circuit, which stated that Congress has been explicit in deciding that a conflict between an individual employee claiming discriminatory violations and the interests of the majority must be resolved in favor of the former.[170] It also cites an appeal from an NLRB decision, *International Union of Electric & Machine Workers*,[171] for the proposition that an individual discrimination complainant's right to confidentiality is paramount to the union's right to have the complainant's name.[172]

The FLRA in *Columbia Typographical Union* recognized that when an employee participates in an EEO procedure there might be a spill over into the bargaining unit's interest.[173] It stated that "while a union has no right to participate in the informal adjustment of an EEO complaint where a bargaining unit employee has elected to pursue the compliant, . . . [the union] may have a role if the settlement gives rise to an impact on the bargaining unit."[174] Interpreting this passage, a commentator stated that the most reasonable understanding is that while the union does not have a right to be present at EEO settlement discussions, the union does have a right to bargain with the employer over any impact the settlement may have on other union members.[175]

The FLRA decisions and court cases dealing with public unions have abided by *Gardner-Denver* and congressional intent in allowing public employees to seek resolution of their complaints in settlement meetings

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[168] *See id.* at 35.

[169] *See id.* at 39; *see also* IRS, Fresno Serv. Ctr. v. FLRA, 706 F.2d 1019, 1023–24 (9th Cir. 1983) (finding that because the EEOC characterizes a precomplaint conciliation as informal, the union had no right to be present).

[170] *See Columbia Typographical Union*, 23 F.L.R.A. at 39 (quoting National Treasury Employees Union v. FLRA, 774 F.2d 1181, 1189 n.12 (D.C. Cir. 1985)). In *National Treasury Employees Union*, the court stated that the union's role is more restricted in employee statutory procedures. *See National Treasury Employees Union*, 774 F.2d at 1188. Marksteiner states that the court "essentially says if this were a case wherein an EEO complainant did not want the union present, the individual's interest would prevail over the union's." *See* Marksteiner, *supra* note 121, at 113.

[171] 648 F.2d 18 (D.C. Cir. 1980).

[172] *See Columbia Typographical Union*, 23 F.L.R.A. at 39 n.5 (citing International Union of Elec. Radio & Mach. Workers, 648 F.2d at 27).

[173] *See id.* at 40.

[174] *Id.*

[175] *See* Marksteiner, *supra* note 121, at 118.

without union representation. The NLRB should follow suit. *Gardner-Denver* does not distinguish between public and private employees; instead it holds that unionized employees in general have a statutory right to pursue the resolution of their discrimination claims outside of the union process. And the Civil Rights Act of 1991 encourages employees, both public and private, to pursue that resolution through alternative means of dispute resolution. If the FLRA and courts have interpreted *Gardner-Denver* and the Civil Rights Act as allowing public employees to participate in a discrimination-related settlement conference without the union, then the NLRB should not draw a distinction and keep this same right from private employees.

C. *Administrative Dispute Resolution Act of 1990—Statutory Right to Confidentiality*

As a federal agency, the USPS[176] has an additional argument: a statutory mandate for confidentiality in ADR. The ADRA requires federal agencies to "adopt a policy that addresses the use of alternative means of dispute resolution and case management."[177] In implementing the ADR process, the ADRA directs federal agencies to keep in confidence dispute resolution communication.[178]

Originally enacted in 1990, the ADRA supplies alternatives to the "increasingly formal, costly, and lengthy [administrative proceedings] resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes."[179] The ADRA requires the following four elements of a dispute resolution program:

> First, the Act covers use of alternative means of "dispute resolution [process,]" which by definition includes mediation. Second, the process must be employed to resolve "an issue in controversy," the definition of

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[176] USPS employees account for 30% of all federal employees and account for 50% of all federal EEO complaints. *See* Bingham & Hallberlin, *supra* note 6, at 1. Employing almost 900,000 people, the USPS receives from 25,000 to 30,000 requests for precomplaint counseling. *See id.*

[177] Administrative Dispute Resolution Act § 3, 5 U.S.C. § 571 note (1994 & Supp. IV 1998) (Promotion of Alternative Means of Dispute Resolution).

[178] *See* Administrative Dispute Resolution Act § 4, 5 U.S.C. § 574 (1994 & Supp. IV 1998). As a matter of fact, the 1996 amendments made a significant change by expanding the disclosure protections to communications made to and from ADR neutrals in mediation and other ADR processes. *See id.* For a discussion on this change, see *Contract Law Note*, ARMY LAW., July 1997, at 34, 34.

[179] 5 U.S.C. § 571 note (Congressional Findings).

> which clearly covers EEO complaints of discrimination. . . . Third, a neutral will be appointed to serve as "a conciliator, facilitator, or mediator . . . at the will of the parties. . . ." Fourth, the parties who will participate in the process should be clearly identified.[180]

The neutral, pursuant to the ADRA, "shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral."[181]

The confidentiality provision in the ADRA conflicts with section 9(a) of the NLRA. Whereas the ADRA promotes confidentiality, the NLRA gives the union the right to have notice of and an opportunity to be present at the adjustment of an employee grievance. Thus, if a USPS employee attempts to take part in a pregrievance mediation and wants to preserve informality and confidentiality by keeping the union representative out, the ADRA certainly will support such a decision whereas the NLRA will not.

This conflict between the ADRA and the NLRA is a timely concern for the USPS. By the year 2000, the USPS plans to launch nationally its Resolve Employment Disputes, Reach Equitable Solutions Swiftly program (REDRESS).[182] The program will implement mediation as an alternative to the traditional EEO complaint process.[183] When employees request mediation, their case will be referred to an outside mediator who will mediate the dispute within approximately two weeks of the request.[184]

REDRESS appears to be in compliance with the four elements that the ADRA requires of a dispute resolution program.[185] First, the mediation program is a dispute resolution process.[186] Second, the program deals with issues in controversy—discrimination disputes.[187] Third, the program will

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[180] Marksteiner, *supra* note 121, at 101–02 (quoting 5 U.S.C. § 571(3), (8), (10) (alteration in original)).

[181] 5 U.S.C. § 574(a).

[182] *See* Bingham & Hallberlin, *supra* note 6, at 1; *see also* Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of REDRESS at the United States Postal Service*, REV. PUB. PERSONNEL ADMIN., Spring 1997, at 1, 20 (describing the REDRESS pilot programs).

[183] *See* Bingham, *supra* note 182, at 20. Bingham notes that interest-based mediation is a positive alternative to the traditional adversarial EEO complaint process. *See id.* at 29.

[184] *See* Bingham & Hallberlin, *supra* note 6, at 1.

[185] *See supra* note 180 and accompanying text.

[186] *See supra* note 180 and accompanying text.

[187] *See supra* note 180 and accompanying text.

appoint neutrals.[188] The last requirement, that the parties who participate will be clearly identified, is not clear.[189] If this last requirement is fulfilled, then REDRESS will be an ADRA program and will benefit from the ADRA's confidentiality provisions. The program also allows employees to bring advocates to the mediation representation, including union representatives.[190] But what if the employee does not want the union to attend?

If REDRESS complies with the ADRA, then in addition to arguing individual rights under *Gardner-Denver*, arguing individual rights underlying the decisions relating to public employees under the FSLMRS, and arguing congressional encouragement for Title VII disputes to be resolved through ADR, the employer and employee can argue that in pursuing the resolution of the employee's complaint "through a system Congress intended to be confidential[, the employee] may exclude the union from private caucuses[191] between himself and the mediator without having the [employer's] acquiescence [violate section 9(a)]."[192]

V. ALTERNATIVES TO A TOTAL BAN ON THE UNION'S REPRESENTATIONAL RIGHTS

This Note has presented several compelling reasons for the NLRB to reconsider how section 9(a) affects confidentiality in discrimination-related mediations. In reconsidering the union's right to be present, the NLRB must remember that banning the union is not a wholesale abandonment of the union's right. The union is still able to bargain over any settlements which impact the majority during collective bargaining negotiations, and the union is still protected by the proviso of section 9(a) that states that any settlement made cannot be contrary to the union contract. If, however, the NLRB is not

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[188] *See supra* note 180 and accompanying text; *see also* Bingham, *supra* note 182, at 9 (noting that the program will use outside neutrals to serve as mediators). REDRESS will be the nation's largest program using outside neutrals to mediate EEO complaints. *See id.* at 1.

[189] *See supra* note 180 and accompanying text.

[190] It is the employee's *Weingarten* right to have a union member at an investigatory-type meeting with the employer. *See supra* note 30.

[191] A caucus is the part of mediation where the individual parties meet with the mediator separately to discuss confidential information. *See* Ernie Odon, *The Mediation Hearing: A Primer, in* MEDIATION CONTEXTS AND CHALLENGES 5, 12–13 (Joseph E. Palenski & Harold M. Launer eds., 1986). This Note assumes that if the union must be present at a pregrievance mediation as a representative of the employee, then the representative also will sit in on the caucus.

[192] *See* Marksteiner, *supra* note 121, at 144.

prepared to ban totally union representatives from confidential mediations, then perhaps one of the following alternatives to a total ban would be more acceptable.

One alternative is to allow union presence with proper restraints. The union member will be restrained from speaking of anything heard in the mediation or using it in any way against management in the union grievance process. The union representative also will be restrained from intervening during settlement discussions. This proposition will not work, though, if the employee, no matter the constraint, does not want the union representative present. Furthermore, the union representative's presence, even if restrained, still could prove to be a barrier to communication.[193]

A second alternative, based on the courts' decisions in *International Union of Electrical Radio & Machine Workers v. NLRB*[194] and *Safeway Stores, Inc. v. NLRB*[195] is to allow the union to know the outcome of a settlement without knowing who the parties are or the details of the mediation communications, thus preserving confidentiality and keeping the union member out of the meeting where his presence may cause problems. If the union is upset with a series of settlements, then at bargaining time the union member can take appropriate actions. If the settlement went against a provision in the bargaining agreement, which section 9(a) states cannot happen, the union can insist that the settlement be adjusted.

Third is the alternative introduced by the ALJ in *United States Postal Service & American Postal Workers Union.*[196] Although the ALJ's ultimate decision was overruled by the NLRB, the compromise that it proposed is worth mentioning. The ALJ had found that the EEO regulations, which required anonymity at the precomplaint stage, when coupled with the underlying policies of Title VII, were significant enough to subordinate the language of section 9(a).[197] The ALJ also found that the union had a substantial majoritarian interest. Thus, the ALJ proffered the following: the union would have no right to be present in the EEO precomplaint meetings, but the settlement coming out of that meeting would not bind the union.[198]

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[193] *See supra* Part II.

[194] 648 F.2d 18 (D.C. Cir. 1980).

[195] 691 F.2d 953 (10th Cir. 1982).

[196] 281 N.L.R.B. 1015 (1986); *see also supra* Part III.A.

[197] *See* United States Postal Serv. & Am. Postal Workers Union, 281 N.L.R.B. at 1024.

[198] *See id.* at 1028.

Thus, the union still would have a right to advance its claims under the contract.[199]

Although there may be some diminution in the value of the settlement from the meeting, the ALJ stated that the diminution should not be overstated.[200] The ALJ stated that the union was unlikely to pursue a grievance that was significant only to one individual when that individual has already agreed to a settlement unless there are important institutional interests involved.[201] The Union certainly would "be less inclined to initiate or continue to process a grievance solely to avoid being accused of failing to fairly represent a particular claimant when the claimant has already entered into an EEO settlement expressly relinquishing his or her own rights to pursue the claim further."[202]

Lastly, the union and employer can, before hand, come up with an acceptable range of settlements for certain actions. During mediation, the mediator could keep those parameters in mind as she facilitates the discussion. The employee, therefore, is able to pursue his private right to settle the issue in an informal and timely manner and is able to have a more successful mediation because of confidentiality.

These alternatives may or may not work depending on the relationship between the employer and the union and on the employer's and union's willingness to negotiate and compromise over the degree confidentiality. Whatever the solution, a confidential mediation extending to the union some rights is better than a mediation without confidentiality at all.

VI. CONCLUSION

The second proviso of section 9(a) of the NLRA that extends to unions the right to be present at the adjustment of grievances most likely was enacted as the result of congressional fear that the individual adjustment of a grievance, without the union present, might have a negative affect on the majority. That fear, however, stops at discrimination-related disputes. Congress, by extending to individuals the right to resolve discrimination-related disputes outside the grievance process and to seek that resolution through alternative dispute resolution has, as the Supreme Court holds,

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[199] *See id.*

[200] *See id.*

[201] *See id.*

[202] *Id.* at 1027. The ALJ, citing *Gardner-Denver*, went on to state that "duplication of similar substantive rights should not be lightly diminished merely because a particular party's incentive to settle in one forum will be discouraged by the existence of another independent forum." *Id.*

extended an individual right that trumps the majority right.

Because employees have this statutory right, the NLRA must allow employees to use it to keep the union out of employer-initiated discrimination-related mediations. Denying them the right not only will inhibit the employee's right to resolve her own discrimination complaints against congressional intentions, but also will inhibit the employee's and employer's chance to have a successful mediation that cuts cost and time and saves workplace relationships.